Nos. 14-1418, 14-1453, 14-1505,
15-35, 15-105, 15-119 & 15-191

In The
Supreme Court of the United States

DAVID A. ZUBIK, et al.,

Petitioners,

v.

SYLVIA BURWELL, Secretary of
Health and Human Services, et al.,

Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Third, Fifth, Tenth And District Of Columbia Circuits

BRIEF OF *AMICI CURIAE* CATHOLICS FOR CHOICE, CALL TO ACTION, CORPUS, A CRITICAL MASS, DIGNITYUSA, THE NATIONAL COALITION OF AMERICAN NUNS, NEW WAYS MINISTRY, THE QUIXOTE CENTER/CATHOLICS SPEAK OUT, THE WOMEN'S ALLIANCE FOR THEOLOGY, ETHICS AND RITUAL, AND THE WOMEN'S ORDINATION CONFERENCE, IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are Catholic organizations that represent the interests of Catholic laity, workers, women, children, and LGBT people. *Amici* believe as a matter of their deep Catholic faith that religious freedom is the right of *every person*, Catholic, non-Catholic, female, male, gay, lesbian, bisexual, transgender, worker, and dependent. If the Petitioners receive the exemption from the contraceptive benefit of the Affordable Care Act that they request from this Court, hundreds of thousands of Catholic and non-Catholic women and their families across the country could be deprived of their right to make their own decisions of conscience about healthcare. *Amici* respectfully bring these employees' voices to this Court, asking this Court to recognize that women's reproductive rights and religious liberty should not be defeated by a religious exemption that leaves contraceptive coverage unavailable to women employees and their families.

If Petitioners are successful in this case, Catholic *Amici* also anticipate that Catholic organizations – schools, universities, colleges, hospitals, and social services agencies – will be pressured by the bishops to

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[1] No counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *Amici* or their counsel made a monetary contribution to this brief's preparation or submission. All parties have consented in writing to the filing of this *amicus* brief.

oppose health insurance benefits for same-sex couples and their dependents; refuse maternity care to single women and married couples who bear children with the aid of reproductive technology; deny adoptive children to gay and lesbian parents; and fire non-Catholic and non-ministerial Catholic employees for getting married, supporting same-sex marriage or reproductive rights, bearing children with the help of reproductive technology, using contraception, and exercising other constitutional rights.

Catholics for Choice (CFC) represents the majority of Catholics on issues of sexual and reproductive rights and health, and is the leading voice in debates at the intersection of faith, women's health, reproductive choice, and religious liberty. Founded in 1973, CFC seeks to shape and advance sexual and reproductive ethics that are based on justice, reflect a commitment to women's well-being, and respect and affirm the capacity of women and men to make moral decisions about their lives. CFC's work promotes respect for the moral autonomy of every person, based on the foundational Catholic teaching that every individual must follow his or her own conscience and respect others' right to do the same.

Call To Action is one of the largest organizations working for equality and justice in the Catholic Church today. With over 25,000 members and supporters and 50 chapters nationally, Call To Action educates, inspires and activates Catholics to act for justice and build inclusive communities. In doing so, Call To Action does not condone discrimination on the

basis of sexual identity, conscience decisions, and/or personal decision-making that does not conform to institutional Catholic dictates.

CORPUS is an international Catholic organization representing the vast majority of Roman Catholics seeking an inclusive priesthood. This inclusivity affirms the human and reproductive rights of women and men.

A Critical Mass: Women Celebrating Eucharist (ACM) is a community that empowers women in the Roman Catholic tradition through dialogue and liturgy. ACM is an open and welcoming community that was born out of theological reflection, faith sharing, and desire for an inclusive role for women in the Catholic Church.

DignityUSA was founded in 1969 and is an organization of lesbian, gay, bisexual, and transgender (LGBT) Catholics and supporters. Among the areas of concern outlined in its Statement of Position and Purpose is the promotion of "equal access and justice in all areas of healthcare and healing." DignityUSA is concerned that LGBT people could be denied equal access to healthcare services if employers are allowed to restrict healthcare coverage on the basis of the religious belief of the owners.

The **National Coalition of American Nuns (NCAN)** began in 1969 to study and speak out on issues of justice in church and society. Among other things, NCAN calls on the Vatican to recognize and work for women's equality in civil and ecclesial

matters, to support gay and lesbian rights, and to promote the right of every woman to exercise her primacy of conscience in matters of reproductive justice.

New Ways Ministry represents Catholic lay people, priests, and nuns who work to ensure that the human dignity, freedom of conscience, and civil rights of LGBT people are protected in all circumstances, including in making decisions about healthcare. New Ways Ministry is a national Catholic ministry of justice and reconciliation for people and the wider Catholic Church. Through education and advocacy, New Ways Ministry promotes the full equality of LGBT people in church and society. New Ways Ministry's network includes Catholic parishes and college campuses throughout the United States.

The Quixote Center/Catholics Speak Out is a faith-based organization that urges Catholics to take adult responsibility for their lives. This includes making decisions according to one's conscience regarding reproductive rights.

The **Women's Alliance for Theology, Ethics and Ritual (WATER)** is a non-profit educational organization made up of justice-seeking people, from a variety of faith perspectives and backgrounds, who promote the use of feminist religious values to make social change. WATER believes that women's health decisions are private, and that the community's responsibility is to make healthcare available for everyone. WATER participates in this *amicus* brief because

a just society both respects privacy and promotes health.

The **Women's Ordination Conference (WOC)**, founded in 1975, is the oldest and largest national organization that works to ordain women as priests, deacons and bishops into an inclusive and accountable Catholic Church. WOC affirms women's gifts, openly and actively supports women's voices, and recognizes and values all ministries that meet the spiritual needs and human rights of all people. WOC promotes respect and self-determination of all people based on personal discernment.

SUMMARY OF ARGUMENT

The Catholic *Amici* believe as a matter of their profound religious faith that religious freedom is a universal right required by the dignity of the human person. Because the fundamental human right to religious freedom is rooted in human dignity, *Amici* believe that religious freedom is the right of *every person*, Catholic and non-Catholic, female and male, worker and dependent. *See* Second Vatican Council, *Declaration on Religious Freedom*, *in* The Documents of Vatican II 675, 679 (Walter M. Abbott, S.J. ed., 1966) ("[T]he right to religious freedom has its foundation in the very dignity of the human person as this dignity is known through the revealed word of God and by reason itself."); *see also* John Courtney Murray, *The Declaration on Religious Freedom*, *in*

Bridging the Sacred and the Secular 198-99 (J. Leon Hooper ed., 1994) ("The foundation of the right [to religious freedom] is the truth of human dignity."). On behalf of the hundreds of thousands of Catholic and non-Catholic employees of religious organizations and their dependents, *Amici* urge this Court to recognize the religious freedom interests of those employees in the birth control benefit of the Affordable Care Act (ACA) by rejecting the Petitioners' request for a complete exemption from the requirement to provide this important health insurance benefit.

"Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise *unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling.*" *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2786-87 (2014) (Kennedy, J., concurring) (emphasis added). The Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, *et seq.*, does not require the Petitioners' proposed restrictions on the health and religious freedom interests of employees. The Religion Clauses of the First Amendment prohibit them.

The *Amici* respectfully ask this Court to consider the interests of more than 71 million Catholics in the United States, 72 percent of whom support coverage for birth control in both private and government-run health insurance plans, and almost 80 percent of whom believe that using contraception is morally

acceptable. *See* P.J. Kenedy & Sons, *The Official Catholic Directory Anno Domini* 2047-87 (2015); Belden Russonello Strategists, Inc., *Catholic Voters and Religious Exemption Policies* 9 (Oct. 2014), https://www.catholicsforchoice.org/news/pr/2014/documents/11.17.14NationalCatholicVotersSurvey2014.pdf; Univision, *Voice of the People* (last visited Feb. 11, 2016), http://www.univision.com/noticias/la-huella-digital/la-voz-del-pueblo/matrix. Among sexually-active Catholic women, 99 percent have used contraception. *See* Guttmacher Institute, *Fact Sheet: Contraceptive Use in the United States* (Oct. 2015), http://www.guttmacher.org/pubs/fb_contr_use.html#6a; Catholics for Choice, *The Facts Tell The Story: Catholics and Choice* 4 (2014-2015), http://www.catholicsforchoice.org/topics/catholicsandchoice/documents/FactsTelltheStory2014.pdf. Additionally, in the realm of employment, the 17,755 Catholic parishes across the United States employ thousands of workers. The 639 Catholic hospitals alone employ more than 516,410 full-time employees and 220,795 part-time workers in addition to the tens of thousands of workers employed at the 438 ancillary care systems, medical centers, sanatoriums and hospices. *See* Catholic Health Association of the United States, *Catholic Health Care in the United States* 2 (Jan. 2016), https://www.chausa.org/docs/default-source/general-files/cha_mini_profile2016.pdf?sfvrsn=2; Kenedy at 2047-87. The 233 Catholic colleges and universities in the United States provide insurance coverage to hundreds of thousands of workers and their dependents, and educate more than 800,000 students. *See* Kenedy at 2047-87.

Although RFRA requires that these employees' compelling interests in religious and reproductive freedom be considered in any accommodation of their employers' religious freedom, Petitioners and their *Amici* demand, not an accommodation, but a *complete exemption* from the contraceptive coverage requirement of the Affordable Care Act (ACA). This overbroad and total exemption would not only unduly restrict Catholic and non-Catholic women employees and their dependents from protecting their own compelling interests in religious and reproductive freedom, but also involve the government in restricting and demeaning those employees' exercise of religious and reproductive freedom. Thus the Petitioners' proposed exemption is prohibited by RFRA, which does not permit "requests for religious accommodations [that] become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize an institution's effective functioning." *Cutter v. Wilkinson*, 544 U.S. 709, 711 (2005) (interpreting RFRA's parallel statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc, *et seq.*).

In the Catholic world alone, the proposed exemption could restrict equal access to contraception for hundreds of thousands of workers and their dependents. To apply RFRA properly, this Court "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter*, 544 U.S. at 720 (citing *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985)). In this case, the burden on nonbeneficiary employees is unconstitutionally broad;

if this Court grants Petitioners' exemption request, thousands of women could immediately lose their right of access to contraceptive insurance. In contrast to *Hobby Lobby*, in this case there is *no* "existing, recognized, workable, and already-implemented framework to provide coverage," and the "mechanism for doing so is [*not*] already in place." *Hobby Lobby*, 134 S. Ct. at 2786. Thus the burden on employees' rights would be immediate, excessive, and extreme if this Court were to grant Petitioners' request for a complete exemption from the birth control benefit requirement.

This Court's RFRA and RLUIPA "decisions indicate that an accommodation must be measured so that it does not override other significant interests." *Cutter*, 544 U.S. at 722. Numerous significant interests are at stake in this case. In addition to the government's "legitimate and compelling interest in the health of female employees," *Hobby Lobby*, 134 S. Ct. at 2786, the employees have religious freedom and reproductive freedom interests that will be negated if their employers are completely exempted from this provision of the ACA. An exemption for Petitioners would serve no compelling interests for either the government or the women affected. Moreover, under RFRA, the government's proposed accommodation is the least restrictive means of furthering those specific reproductive and religious interests of women employees. It is difficult to imagine a less restrictive means than asking the Petitioners to do what they have already done, namely publicly assert their

objection to contraception and tell the government they do not want to pay for it.

Amici believe as a matter of their deep Catholic faith that all employees are equally entitled to coverage of contraceptive services under the ACA, no matter where they work or what they believe. They also believe that the least restrictive means of advancing the critical ideals of religious liberty and women's equality would be to require all employers, including churches and their integrated auxiliaries, to provide access to contraception. They urge this Court to reject Petitioners' argument that the government's exemption of churches and integrated auxiliaries mandates an additional exemption for all religious organizations. If the government's exemption of some churches but not other religious organizations violates RFRA and the Religion Clauses, as Petitioners argue, then the original exemption must be invalidated. An unconstitutional remedy does not cure a constitutional violation, *United States v. Virginia*, 518 U.S. 515, 534 (1996), and a larger exemption does not solve the constitutional problems with the smaller exemption that the government created here.

Moreover, under this Court's precedents, the Department of Health and Human Services (HHS) lacked the constitutional authority to exempt the churches and their integrated auxiliaries from the ACA. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). In these circumstances, RFRA does not require the broader exemption requested by the Petitioners, and the Religion Clauses of the First Amendment prohibit it.

"At some point, accommodation [of religious freedom] may devolve into 'an unlawful fostering of religion'" and violate the Establishment Clause. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334-35 (1987) (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 145 (1987)). That point is reached here, where Petitioners reject every accommodation offered by the government and demand a complete exemption from the contraceptive benefit. Like the Connecticut statute that unconstitutionally "arm[ed] Sabbath observers with an absolute and unqualified right not to work on whatever day they designate as their Sabbath," the requested exemption in this case violates the Establishment Clause through its "unyielding weighting in favor of [religious organizations] over all other interests," especially the interests of Catholic women in furthering their reproductive health and protecting their religious freedom. *Caldor*, 472 U.S. at 709; *Cutter*, 544 U.S. at 722.

ARGUMENT

I. RFRA REQUIRES THIS COURT TO TAKE ACCOUNT OF THE INTERESTS OF THE EMPLOYEES AND THEIR DEPENDENTS WHO WOULD BE HARMED BY PETITIONERS' EXEMPTION FROM THE CONTRACEPTIVE BENEFIT REQUIREMENT.

This Court's First Amendment cases have always considered the effects of religious accommodations on the well-being of third parties whose interests might be affected by the accommodation. In *Estate of Thornton v. Caldor, Inc.*, for example, this Court invalidated a Connecticut statute that gave Sabbatarians an absolute right not to work on their Sabbath because the statute took "no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." *Caldor*, 472 U.S. at 709. Similarly, in *United States v. Lee*, this Court rejected Amish employers' requests for exemption from paying social security taxes because the exemption "operates to impose the employer's religious faith on the employees." 455 U.S. 252, 261 (1982).

This Court has interpreted both RLUIPA and its parallel statute, RFRA, to require the same analysis. Prisoners do not enjoy an absolute right to religious accommodations under RLUIPA. Their demands must be weighed against the "burden a requested accommodation may impose on nonbeneficiaries" and "measured so that [they do] not override other significant interests." *Cutter*, 544 U.S. at 720, 722. Courts enforcing RLUIPA must evaluate prison officials' and other

prisoners' interests in an "appropriately balanced way," *id.* at 722, and reject inmate requests that "impose unjustified burdens on other institutionalized persons." *Id.* at 726; *see also Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring) ("[A]ccommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief.").

Similarly, employers do not enjoy an absolute right to religious accommodations under RFRA. In *Hobby Lobby*, this Court explicitly rejected the suggestion that RFRA requires accommodations "no matter the impact that accommodation may have on . . . thousands of women employed by Hobby Lobby." *Hobby Lobby*, 134 S. Ct. at 2760; *see also id.* at 2783 ("Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs."). Vaccination-coverage requirements could be upheld against religious employers, for example, in order to protect third persons against the spread of infectious diseases and increase herd immunity. *Id.* at 2783. In other words, the religious freedom accommodations of employers must not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling." *Id.* at 2786-87 (Kennedy, J., concurring).

Petitioners' requested exemption would inflict numerous harms on Catholic women employees and their dependents in an unbalanced manner that contradicts the RFRA framework. These harms are both

material and dignitary. *See* Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale L.J. 2516, 2566-78 (2015). The direct material harm is loss of the preventive services healthcare to which both the ACA and the government's proposed accommodation entitle employees. If Petitioners receive their exemption in this case, in contrast to *Hobby Lobby*, there is *no* "existing, recognized, workable, and already-implemented framework to provide coverage," and the "mechanism for doing so is [*not*] already in place." *Hobby Lobby*, 134 S. Ct. at 2786. Thus the burden on women employees' rights would be immediate, excessive, and extreme.

In contrast to this case, in *Hobby Lobby* the burden on women was "precisely zero." *Hobby Lobby*, 134 S. Ct. at 2760. If Petitioners receive their exemption from this Court, in the Catholic world alone hundreds of thousands of employees and their dependents could lose access to contraceptive coverage. *See generally* Kenedy. Every employee of a Catholic organization in the United States could face the dilemma of "Sandra," a science teacher at a Catholic school in the Midwest who did not want her real name revealed. Sandra's careful financial planning with her husband about the costs of their insurance coverage unraveled because her insurance did not cover birth control. For the hundreds of thousands of employees of Catholic institutions nationwide, like Sandra and the other 163,000 lay teachers at Catholic elementary and high schools, whose family

budgets are directly tied to their insurance coverage, the burden of out-of-pocket costs for "birth control is a lot of extra money." Catholics for Choice, *Comments Re: Advance Notice of Proposed Rulemaking for Certain Preventive Services under the Affordable Care Act* 4 (Jun. 19, 2012), http://www.catholicsforchoice.org/news/pr/2012/documents/6.19.2012CatholicsforChoiceComments_CMS-9968-ANPRM.pdf.

This Court has long recognized the dignitary harms associated with the "deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 291-92 (1964). Private Catholic employees suffer similar dignitary harms whenever the government authorizes their employers to deny them access to benefits enjoyed by their fellow citizens. On the subject of contraceptive access, in particular, the "refusal to furnish insurance covering contraception [inaccurately] labels an entire group of employees – women using certain contraceptives – as sinners." Nejaime & Siegel at 2575-76. Petitioners may believe that women who choose contraception are sinners; they are not entitled to government ratification and enforcement of their belief. Employees have the constitutional right to make moral decisions in good conscience about what is best for their personal health and their families' well being. *See Griswold v. Connecticut*, 381 U.S. 479 (1965) (use of contraception falls within the zone of privacy protected by the Constitution).

Such denial of benefits also degrades the dignitary free exercise rights of employees, which are protected by both the Constitution and the teachings of the Catholic church. *Compare Hobby Lobby*, 134 S. Ct. at 2785 ("free exercise is essential in preserving . . . dignity") with Second Vatican Council at 679 ("[T]he right to religious freedom has its foundation in the very dignity of the human person as this dignity is known through the revealed word of God and by reason itself.").

The Petitioners' proposed exemption is especially "stigmatiz[ing] and demean[ing]" to Catholic women. Nejaime & Siegel at 2576. Since the 1960s, American Catholic women have used contraception in numbers that match their non-Catholic counterparts. They continue to do so now, even though, from the moment the government proposed the contraceptive coverage benefit, some of the Petitioners requested a complete exemption from the benefit because they believe contraception is always immoral. *See* Laura Bassett, *The Men Behind the War on Women*, Huffington Post, Nov. 1, 2011, http://www.huffingtonpost.com/2011/11/01/the-men-behind-the-war-on_n_1069406.html; Leslie C. Griffin, *The Catholic Bishops vs. the Contraceptive Mandate*, 6 Religions 1411, 1415 (2015), http://www.mdpi.com/2077-1444/6/4/1411.

Both Catholic and non-Catholic women suffer dignitary harm whenever the government's exemptions and accommodations confer its imprimatur on the Catholic hierarchy's decree that the use of contraception is morally forbidden to all, Catholic and

non-Catholic alike. Just as "the bakery owner who turns away a same-sex couple treats that particular couple as sinners," the proposed exemption stigmatizes and demeans Catholic women by confirming, with government approval, their employers' notion that women who use contraception act immorally. Nejaime & Siegel at 2576.

A strong majority of Catholic women (79 percent) have rejected the idea that the use of contraception is morally wrong, instead choosing in good conscience to make their own decisions about their personal health and family size. *See* Univision. RFRA does not require the government to allow employers to put employees in disadvantageous positions. RFRA does not require employers' religious beliefs to trump those of their employees. *That is not the way RFRA should work. See* Oral Arg. Tr. at 33, *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356) (Justice Kennedy: "[I]n a way, the employees are in a position where the government, through its healthcare plans, is – is, under your view, is – is allowing the employer to put the employee in a disadvantageous position. The employee may not agree with these religious – religious beliefs of the employer. Does the religious beliefs just trump? Is that the way it works?").

The religious freedom rights of women employees of Catholic institutions also provide a compelling government interest that must be part of the RFRA analysis in this case.

II. THE GOVERNMENT'S ACCOMMODATION WAS THE LEAST RESTRICTIVE MEANS TO PROTECT ITS COMPELLING INTERESTS IN THE REPRODUCTIVE HEALTH AND RELIGIOUS FREEDOM OF WOMEN EMPLOYEES OF CATHOLIC INSTITUTIONS AND THEIR DEPENDENTS.

This Court has repeatedly held that "[c]ontext matters" in the application of the compelling governmental interest standard. *Cutter*, 544 U.S. at 723; *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006); *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003). In this case, the context includes the rights of women employees and their dependents to access contraceptive insurance coverage. Therefore the heavy burden on nonbeneficiary women's reproductive and religious freedom must "inform the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest." *Hobby Lobby*, 134 S. Ct. at 2781 n.37.

This Court has already recognized that the birth control benefit "furthers a legitimate and compelling interest in the health of female employees." *Id.* at 2786 (Kennedy, J., concurring). The experience of Catholic and non-Catholic women employees demonstrates that the government has an additional compelling interest in protecting the religious freedom of employees who believe that their faith allows contraceptive use. Because the Petitioners' proposed exemption "operates to impose the employer's religious faith

on the employees," it must be rejected. *Lee*, 455 U.S. at 261.

From the time HHS first proposed the birth control benefit, Petitioners requested the complete exemption that the government eventually granted to churches and their integrated auxiliaries. *See* 26 U.S.C. § 6033(a)(3)(A)(i), (iii); 45 C.F.R. § 147.131(a) (defining the federal government's complete exemption of "churches, their integrated auxiliaries, and conventions or associations of churches," as well as the "exclusively religious activities of any religious order" from the benefit). HHS's repeated redrafting and reconsideration of both exemptions and accommodations to the contraceptive benefit requirement demonstrated the government's concern about the effects of either an exemption or an accommodation on employees' religious freedom. During the drafting of the church exemption, the government struggled to find the right language to protect the religious freedom rights of employees. *Id.* The government first justified the exemption by asserting that churches and integrated auxiliaries are "more likely than other employers to employ people of the same faith who share the same objection," 78 Fed. Reg. 39,870, 39,874 (Jul. 2, 2013), but then later removed a requirement that the exempted institutions primarily employ only people who share their faith. *Id.* at 39,873.

The history of this notice-and-comment process confirms that the government had a compelling interest in protecting *all* employees' religious liberty throughout the development of the accommodation

that Petitioners challenge in this case. The government has thus met its heavy burden to "'show with more particularity how its admittedly strong interest . . . would be adversely affected by granting an exemption.'" *O Centro*, 546 U.S. at 431. In contrast to the government's efforts, Petitioners' proposed total exemption protects neither the compelling interest in women's equality nor the compelling interest in women's religious liberty.

The government's compelling interest in employees' religious freedom informs the least restrictive means analysis required by RFRA. The accommodation, which only requires Petitioners to inform the government of their opposition to the contraceptive benefit and to provide minimal information about their insurance carriers, is the least restrictive means of respecting *both* Petitioners' religious freedom and *all* employees' rights not to be shut out of the insurance marketplace because of their employers' religious beliefs.

The government's numerous efforts to accommodate the Petitioners while protecting employees' rights demonstrate that, in this case, in contrast to *Hobby Lobby*:

> [T]here is no less restrictive, equally effective means that would both (1) satisfy the challengers' religious objections to providing insurance coverage for certain contraceptives . . . ; and (2) carry out the objective of the ACA's contraceptive coverage requirement, to ensure that women employees receive, at no

> cost to them, the preventive care needed to safeguard their health and well being.

Hobby Lobby, 134 S. Ct. at 2801-02 (Ginsburg, J., dissenting); *see also Holt*, 135 S. Ct. at 868 (Sotomayor, J., concurring) ("[N]othing in the Court's opinion suggests that prison officials must refute every conceivable option to satisfy RLUIPA's least restrictive means requirement."); Nejaime & Siegel at 2580-81 ("If religious accommodation (1) would inflict material or dignitary harm on those the statute is designed to protect or (2) would produce effects and meanings that undermine the government's society-wide objectives, this impact is evidence that unimpaired enforcement of the law is the least restrictive means of furthering the government's interest.").

In this case, moreover, it is difficult to imagine a less restrictive means than asking the Petitioners to do what they have already done, namely publicly assert their objection to contraception and tell the government they do not want to pay for it.

III. THE CHURCH EXEMPTION DOES NOT PROVIDE JUSTIFICATION FOR THE PETITIONERS' COMPLETE EXEMPTION FROM THE CONTRACEPTIVE BENEFIT REQUIREMENT.

During the notice-and-comments period about HHS's proposed regulations regarding the coverage of preventive services under the ACA, *Amicus* Catholics for Choice (CFC) expressed its objections to granting

any institution or organization permission to deny its workers contraceptive coverage, or to require workers to navigate a complicated series of obstacles in order to obtain coverage. *See* Catholics for Choice, *Comments Re: NPRM: Certain Preventive Services Under the Affordable Care Act* (Apr. 8, 2013), http://www.catholicsforchoice.org/news/pr/2013/documents/04.08.2013CatholicsforChoiceComments-CMS-9968-P.pdf. *Amici* remain convinced that completely excluding *any* woman from equal access to contraception undermines the government's equally compelling interests of protecting religious liberty and advancing women's equality. Any exemption draws arbitrary lines between those women whose consciences are worthy of respect and those deemed unworthy.

In comments submitted to HHS, CFC expressed its specific concern about the thousands of women already left completely out of contraceptive coverage by the church exemption, and the additional hundreds of thousands of employees threatened by the proposed accommodation. *Id.* CFC noted that the federal government's complete exemption of "churches, their integrated auxiliaries, and conventions or associations of churches," as well as the "exclusively religious activities of any religious order" from the birth control benefit would restrict the rights of numerous women church workers who make their own decisions of conscience about contraception. 26 U.S.C. § 6033(a)(3)(A)(i), (iii); 45 C.F.R. § 147.131(a). The gardeners, secretaries, cleaners, cooks, and many others who work for the 17,755 parish churches around the

country should enjoy the same freedom as other American women to make decisions about their health and family size.

Also troubling to *Amici* is the government's initial rationale for the church exemption. HHS first asserted that churches and integrated auxiliaries are "more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39,874. This argument was falsely premised on the idea that members of the world's religions always agree internally about morality. More specifically, the government's assertion was factually inaccurate about Catholic parishes, dioceses, convents, and many other Catholic workplaces. Since the 1960s, American Catholic women have used contraception in numbers that match their non-Catholic counterparts. Griffin at 1415. Among sexually-active Catholic women, 99 percent have used a form of contraception opposed by the Catholic hierarchy. *See* Guttmacher Institute; Catholics for Choice, *The Facts* at 2. Clearly, Catholic women dissent in large numbers from the teaching of their church's hierarchy that contraceptive use is always wrong. Thus the rationale of the government's church exemption was flawed *ab initio*.

Amici's fears about the original exemption were also buttressed by the very public role of the United States Conference of Catholic Bishops (USCCB), who, from the beginning of the discussion of the

contraceptive benefit, requested an exemption for *all* Catholic employers – from parishes to dioceses, schools, universities, colleges, hospitals, and social services agencies. The bishops developed an extensive lobbying campaign to persuade the Obama administration to cease the alleged war on religious liberty that the birth control benefit was supposed to represent. President Obama even met with New York's Archbishop Timothy Dolan, then president of the USCCB, to discuss the "religious liberty issue." *See* Laurie Goodstein, *Bishops Open "Religious Liberty" Drive*, N.Y. Times, Nov. 14, 2011, at A14; *see also* Sara Hutchinson, *It's A Matter of Conscience*, Albany Times Union, Feb. 7, 2012, http://www.catholicsforchoice.org/news/op-eds/2012/Itsamatterofconscience.asp. The bishops, however, were advocating for their own religious beliefs; they do not represent the views of the Catholic people on the morality of contraception. The Catholic employees' perspective on their own religious freedom was not reflected in the exemption. Griffin at 1415.

The bishops' desired exemption included not only religious and secular nonprofit and for-profit *employers*, but also insurance companies and individual *employees* who did not want to participate in an insurance plan that sponsored contraceptive coverage. *See* Office of the General Counsel, *Letter [to HHS] Re: Interim Final Rules on Preventive Services* (Aug. 31, 2011), http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08-2.pdf. Were the bishops to get their

way, the number of affected employees could be enormous. In Petitioner Zubik's single diocese of Pittsburgh alone, for example, 165 Catholic non-profit organizations could subject their employees to this exclusion. Fifty of these organizations employ nearly 8,600 workers, and the 88 Catholic elementary and high schools together employ 1,503 lay teachers. *See* Kenedy at 1069-73, 2075. For the 233 Catholic colleges and universities in the United States that alone employ nearly three-quarters of a million workers and enroll over 800,000 students, the loss of benefits could be tremendous. *See, e.g.*, *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 608 (7th Cir. 2015) (At the University of Notre Dame alone, "Meritain administers coverage for some 4600 employees of Notre Dame (out of a total of 5200) and 6400 dependents of employees. Aetna insures 2600 students and 100 dependents." Although Notre Dame is not a party to this case, Notre Dame has challenged the same accommodation as Petitioners.); Brief *Amicus Curiae* of United States Conference of Catholic Bishops et al. in Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119 & 15-191, at 25 (filed Jan. 8, 2016) (identifying numbers of Catholic students).

Because Catholic women overwhelmingly disagree with the Catholic hierarchy about the morality of contraception, *Amici* agree with Petitioners that the church and integrated auxiliary exemption is arbitrary and utterly irrational. *See* Brief for Petitioners in Nos. 14-1418, 14-1453 & 14-1505 [Pet'rs' Brief I], at 55, 57, 59 (filed Jan. 4, 2016); Brief for

Petitioners in Nos. 15-35, 15-105, 15-119 & 15-191 [Pet'rs' Brief II], at 64-66 (filed Jan. 4, 2016). The exemption harms Catholic women's religious liberty interest in making their own decisions about contraceptive use. The exemption places the government on the Catholic hierarchy's side of an internal religious liberty debate, particularly harming the employees who work at the 17,755 Catholic parishes and 171 dioceses across the United States. *See* Kenedy at 2047-87. Moreover, the exemption does not even consider the religious freedom of *non-Catholic* employees of parishes and dioceses. In contrast, *Amici*'s Catholic faith teaches them to respect and protect non-Catholics' religious freedom equally with their own.

Amici disagree with Petitioners, however, about the appropriate remedy that RFRA requires for the flawed exemption developed by the Department of Health and Human Services. Petitioners argue that the original exemption should be expanded even further. That proposed solution violates separation of powers principles. As Justice Kennedy suggested during *Hobby Lobby*'s oral argument:

> [W]hat kind of constitutional structure do we have if the Congress can give an agency the power to grant or not grant a religious exemption based on what the agency determined? . . . [W]hen we have a First Amendment issue of this consequence, shouldn't we indicate that it's for the Congress, not the agency[,] to determine [who gets the exemption]?

Oral Arg. Tr. at 56-57, *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356); *see also King*, 135 S. Ct. at 2489 ("had Congress wished to assign that question to an agency, it surely would have done so expressly").

In these circumstances, it is neither the Petitioners' nor this Court's job to rewrite the exemption in any way, whether to broaden it to include all religious organizations or to make it consistent with the way Congress drafted the exemption of certain religious employers in Title VII. *See* Pet'rs' Brief II 40 (suggesting Title VII's statutory language as a model for analysis in this case). Congress' clear intent in the ACA was to "require[ ] an employer's group health plan or group-health-insurance coverage to furnish 'preventive care and screenings' for women without 'any cost sharing requirements.'" *Hobby Lobby*, 134 S. Ct. at 2762 (quoting 42 U.S.C. § 300gg-13(a)(4)). The Petitioners' proposed expanded exemption is not consistent with Congress' stated goals to provide preventive healthcare services to *all* women.

An unconstitutional remedy does not cure a constitutional violation. *Virginia*, 518 U.S. at 534. A larger exemption drafted by Petitioners or this Court would not solve the problems associated with a smaller one. It would also usurp Congress' legitimate role in developing accommodations that treat all religions equally, thereby allowing Petitioners to become a law unto themselves. *See Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 890 (1990) ("[L]eaving accommodation to the

political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.").

In addition, in this case, piling one exemption upon another would violate the Religion Clauses of the First Amendment.

IV. INTERPRETING RFRA TO REQUIRE THE PETITIONERS' REQUESTED EXEMPTION WOULD VIOLATE THE RELIGION CLAUSES OF THE FIRST AMENDMENT.

This Court has distinguished between religious exemptions and accommodations, which are permitted by the "play in the joints" between the Religion Clauses, and religious preferences, which the Establishment Clause prohibits. *Compare Amos*, 483 U.S. at 335, with *Caldor*, 472 U.S. at 709-10. The government must heed this Court's warning that "[a]t some point, accommodation may devolve into 'an unlawful fostering of religion'" and violate the Establishment Clause. *Amos*, 483 U.S. at 334-35 (quoting *Hobbie*, 480 U.S. at 145); *see also Lee v. Weisman*, 505 U.S. 577, 587 (1992) ("The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause."). The point of unlawful

fostering of religion is reached with Petitioners' proposed exemption.

In *Cutter*, this Court observed that a religious exemption may violate the Establishment Clause in three different situations: if it does not take account of the burden of the exemption on nonbeneficiaries, if it is not applied neutrally among faiths, or if it gives an "unyielding" preference to religion. 544 U.S. at 720; *see also Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 722 (1994) (Kennedy, J., concurring) ("[A] religious accommodation demands careful scrutiny to ensure that it does not so burden nonadherents or so discriminate against other religions as to become an establishment."). The Petitioners' requested exemption violates all three standards.

First, as *Amici* explained in Part I, the exemption completely ignores the material and dignitary harm to nonbeneficiary employees who have health, reproductive freedom, and religious freedom interests in equal access to contraception under the law. The proposed exemption's failure to take account of these third-party interests not only defeats Petitioners' RFRA claim, but also violates the Establishment Clause by giving a preference to employers' religious interests over employees' religious interests. This case can therefore be distinguished from this Court's other decisions upholding exemptions, which generally "involve legislative exemptions that did not, or would not, impose substantial burdens on nonbeneficiaries while allowing others to act according to

their religious beliefs." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989).

Second, as Petitioners' Briefs demonstrated in exquisite detail, HHS's church exemption favors some religious employers over others in a non-neutral and incoherent fashion. *See* Pet'rs' Brief II 65 ("So, for example, a Unitarian Universalist church can decline to provide contraceptive coverage even if it has no religious objection and instead excludes the coverage purely for reasons of cost or convenience. The government is thus in the odd position of denying an exemption to some religious employers with sincere religious objections to the mandate, while exempting other religious employers who have no religious-based objection to the mandate."); Pet'rs' Brief I 55 ("The Government has also already decided to exempt certain religious organizations, and it has no legitimate justification – much less a *compelling* justification – for forcing other equally religious organizations to comply."). Broadening the exemption would not *increase* neutrality, as the Petitioners suggest. Instead, the proposed total exemption would unconstitutionally "advanc[e] religion" and "provide unjustifiable awards of assistance to religious organizations" at the expense of women's reproductive and religious freedom rights. *Amos*, 483 U.S. at 348 (O'Connor, J., concurring).

The reasonable Catholic observers represented by *Amici* urge this Court to consider that such a broad exemption would endorse the employers' religion over that of employees in a non-neutral manner

in violation of the most fundamental principles of the Religion Clauses. *See id.* ("To ascertain whether the statute conveys a message of endorsement, the relevant issue is how it would be perceived by an objective observer, acquainted with the text, legislative history, and implementation of the statute.").

Third, the Petitioners' proposed exemption gives an "unyielding weighting in favor of [religious organizations] over all other interests," especially the equally important religious interests of Catholic and non-Catholic women employees to make their own decisions of faith about contraception. *Caldor*, 472 U.S. at 709; *Cutter*, 544 U.S. at 722. Thus, just like the Amish employers' Free Exercise request for an exemption from paying social security taxes, Petitioners' proposed exemption must be rejected because it "operates to impose the employer's religious faith on the employees." *Lee*, 455 U.S. at 261. Moreover, just like the Connecticut statute that unconstitutionally "arm[ed] Sabbath observers with an absolute and unqualified right not to work on whatever day they designate as their Sabbath," *Caldor*, 472 U.S. at 709, the requested exemption in this case violates the Establishment Clause by giving an unyielding weighting to the Catholic hierarchy's religious interests over both the interests of Catholics who in good conscience disagree about the use of contraception as well as the interests of non-Catholic employees who work for Catholic organizations.

In *Caldor*, this Court approvingly identified "a fundamental principle of the Religion Clauses, so well articulated by Judge Learned Hand":

> "The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities."

Caldor, 472 U.S. at 709-10 (quoting *Otten v. Baltimore & Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)). *Amici* endorse this constitutional principle as a matter of faith; as Catholics, *Amici* believe that *every person* must enjoy "freedom or immunity from coercion in matters religious." Second Vatican Council at 681. Nonetheless, this coercion is precisely what Petitioners demand in this case: the right to insist that Catholic women conform their conduct to the interests of their church's hierarchy instead of to their own personal religious necessities. In defiance of the First Amendment, Petitioners request an "absolute and unqualified" exemption where "religious concerns automatically control over all secular interests in the workplace," "no matter what burden or inconvenience this imposes on the . . . workers." *Caldor*, 472 U.S. at 709-10.

Neither RFRA nor the Free Exercise Clause of the First Amendment grants Petitioners a right to exemption from the ACA, and the Establishment Clause prohibits it. The exemption does not take account of the burden on nonbeneficiaries, is not applied

neutrally among faiths, and gives an "unyielding" preference to religion. *Cutter*, 544 U.S. at 720.

Amici urge this Court to consider that a grant of Petitioners' requested exemption by this Court would result in a precedent of "startling breadth" that could threaten Catholic workers' rights outside the contraceptive insurance context and compound the Establishment Clause violation already requested by Petitioners. *Hobby Lobby*, 134 S. Ct. at 2787 (Ginsburg, J., dissenting). If Petitioners are successful in this case, *Amici* anticipate that Catholic organizations – schools, universities, colleges, hospitals, and social services agencies – will be pressured by the bishops to oppose health insurance benefits for same-sex couples and their dependents; refuse maternity care to single women and married couples who bear children with the aid of reproductive technology; deny adoptive children to gay and lesbian parents; and fire non-Catholic and non-ministerial Catholic employees for getting married, supporting same-sex marriage or reproductive rights, bearing children with the help of reproductive technology, using contraception, and exercising other constitutional rights. *See, e.g.*, Ray Long et al., *Gay Marriage Bill Off to Rough Start*, Chicago Tribune, Jan. 3, 2013, at C4 (voicing Catholic objection that religious organizations would have to "provide health insurance to an employee's same-sex spouse"); *Herx v. Diocese of Ft. Wayne-S. Bend Inc.*, 48 F. Supp. 3d 1168 (N.D. Ind.), *appeal dismissed sub nom. Herx v. Diocese of Fort Wayne-S. Bend, Inc.*, 772 F.3d 1085 (7th Cir. 2014) (Catholic school fired

married non-ministerial schoolteacher for using in vitro fertilization); Brief *Amicus Curiae* of United States Conference of Catholic Bishops at 10 (recording bishops' objections to providing adoptive children to same-sex couples); *Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251, 2013 WL 360355 (S.D. Ohio Jan. 30, 2013) (Catholic school fired non-Catholic Computer Technology Coordinator for use of artificial insemination); David-Elijah Nahmod, *Assembly Panel Holds Hearing on Religious Workers' Rights*, Bay Area Reporter, Jul. 30, 2015, http://www.ebar.com/news/article.php?sec=news&article=70789 (San Francisco archbishop tries to require non-Catholic and non-ministerial employees to sign an employment contract stating they are ministers who may not violate Catholic sexual norms); *Barrett v. Fontbonne Acad.*, No. NOCV2014-751, 2015 WL 9682042 (Mass. Super. Dec. 16, 2015) (private Catholic school for girls revoked job offer to Food Service Director after he listed his husband as an emergency contact).

The best way to prevent RFRA from acquiring such "breadth and sweep" is for this Court "to ensure that interests in religious freedom are protected." *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring). *Amici* respectfully ask this Court to ensure that the religious interests of Catholic and non-Catholic workers and their dependents are protected so that they may "preserv[e] their own dignity" and "striv[e] for a self-definition shaped by their religious precepts." *Id.*

CONCLUSION

The *Amici Curiae* – Catholics for Choice, Call to Action, CORPUS, A Critical Mass, DignityUSA, the National Coalition of American Nuns, New Ways Ministry, the Quixote Center/Catholics Speak Out, the Women's Alliance for Theology, Ethics and Ritual, and the Women's Ordination Conference – respectfully ask this Court to reject Petitioners' demand for a complete exemption from providing the birth control benefit of the Affordable Care Act and to affirm the judgments of the United States Courts of Appeals for the Third, Fifth, Tenth, and D.C. Circuits.

Respectfully submitted,

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